STATE OF MICHIGAN

COURT OF APPEALS

ROLAND E. ELLIS,

Plaintiff-Appellant,

v

YALE STEEL, INC.,

Defendant-Appellee.

UNPUBLISHED
May 19, 2005

No. 260513
St. Clair Circuit Court
LC No. 03-001812-NO

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, defendant's residential tenant, complained three or four times that the pilot light on his furnace had gone out. In response, defendant sent service personnel to the residence to relight it. After the last such instance, one of the repair persons advised plaintiff that relighting the pilot light was a simple procedure that he could do himself. On December 31, 2002, the pilot light again went out. Plaintiff attempted to relight it, but in the process there was an explosion of excess gas, causing injuries to plaintiff's face and arm.

Plaintiff brought suit, asserting that a valve had malfunctioned so as to cause propane to leak. Plaintiff alleged that defendant thus negligently failed to keep the premises in reasonable repair, and maintained a nuisance. Defendant sought summary disposition, arguing that a housing inspection from May 2002 turned up no problems, and that defendant had no cause to understand that a defective condition existed. The court agreed and granted the motion, stating that plaintiff would need an expert to prove his theory of liability, but had offered none.

Plaintiff's sole issue on appeal is "[w]hether the trial court erred in its conclusion that [plaintiff] must secure an expert to prove the negligence of [defendant] for instructing his tenant to engage in a hazardous activity, an activity that was the duty of the landlord . . . ." Plaintiff has shifted his emphasis; his amended complaint charges defendant with negligent failure to maintain the furnace, nowhere specifically asserting that encouraging plaintiff to try relighting the pilot himself was negligence. The distinction matters little, however, because the question of whether defendant's agent was negligent in encouraging plaintiff to attempt the normally simple and nonhazardous endeavor of lighting a pilot light is itself a function of whether the furnace, as

plaintiff came to it, was in a dangerous state of disrepair in violation of defendant's duty to maintain it.[1]

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). The court considers the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id.* "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

There is no dispute that defendant had a general duty to maintain plaintiff's premises in reasonably safe condition. See MCL 554.139. Nor is there any dispute that maintenance of the furnace was part of that duty. See MCL 125.471. The question is whether defendant offered sufficient evidence to prove that the furnace was defective, and that defendant knew or reasonably should have known of any such defect. See *Raatikka v Jones*, 81 Mich App 428, 430-431; 265 NW2d 360 (1978).

Mere theory, or speculation, linking a defendant's action or inaction to a plaintiff's injury is insufficient to support a claim for damages. See *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994). "Something more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant's negligence being the cause of the injury." *Id.* at 166 (internal quotation marks and citation omitted).

Although the trial court opined that plaintiff needed an expert to prove his case, the legal basis for its ruling was that plaintiff failed to offer sufficient evidence, expert or otherwise, to support his claim. Plaintiff argues that three or four service calls due to an extinguished pilot light provided defendant with knowledge of a dangerous defect in the furnace. However, plaintiff cites no authority that stands for the proposition that such occurrences of that commonplace annoyance, even in relatively close proximity, constitute notice of a *dangerous* defect. Nor does plaintiff cite any authority for the proposition that encouraging a tenant to relight a pilot light himself, in the absence of a known dangerous condition, constitutes negligence. Further, it is impossible to discount the possibility that plaintiff's own negligence in the matter may have caused the explosion. Indeed, speculation or guesswork are required to conclude from such scanty evidence that the explosion was the result of plaintiff's specific theory of a faulty valve.[2]

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[1] Moreover, we note that, in deposition testimony reproduced and appended to plaintiff's brief on appeal, plaintiff did not allege that defendant refused to relight the pilot light again and demanded that plaintiff instead take his own chances in the matter, but only that defendant's agent presented the task as one plaintiff could do himself.

[2] In fact, plaintiff himself, perhaps inadvertently, admits to some question over whether the valve was faulty, having stated in his statement of facts that the pilot light kept going out "due to a *possible* faulty valve" (emphasis added).

Plaintiff complains that defendant's decision to repair the furnace, apparently resulting in the destruction of the suspect valve, shortly after the mishap frustrated his ability to prove the existence of a defective condition. Although this is undoubtedly true, plaintiff asserts only that defendant might have supposed that legal action would follow from the accident, nowhere suggesting that defendant acted in the face of formal or informal requests not to disturb the evidence. Subsequent remedial repairs are not admissible to prove negligence. MRE 407. Nor is a landlord bound to refrain from making such repairs when events occur that might signal impending legal action. For these reasons, we reject plaintiff's assertion that there was anything pernicious about defendant's decision to repair the furnace.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski